

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION,
ELECTRIC BOAT DIVISION

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

HELEN SOBOLEWSKI, WIDOW OF JOSEPH SOBOLEWSKI

and

ESTATE OF JOSEPH SOBOLEWSKI

and

INSURANCE COMPANY OF NORTH AMERICA

Respondents

ON PETITION FOR REVIEW OF A DECISION
AND ORDER OF THE BENEFITS REVIEW BOARD

BRIEF FOR THE DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Benefits Review Board properly affirmed the administrative law judge's finding that General Dynamics is liable as a self-insured employer for the payment of benefits under the Longshoremen's and Harbor Workers' Compensation Act, despite the fact that symptoms of decedent's undiagnosed disease became manifest prior to General Dynamic's becoming a self-insured, during the time General Dynamics was insured by Insurance Company of North America.

COUNTERSTATEMENT OF THE CASE

This is an appeal by General Dynamics Corporation, Electric Boat Division, self-insured employer, seeking reversal of a decision of the Benefits Review Board, United States Department of Labor, which affirmed a decision and order of Administrative Law Judge Louis Scalzo ordering General Dynamics to pay benefits to the widow and estate of Joseph Sobolewski pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq. (Supp. V, 1975) (hereinafter "the Act").

Decedent was employed by General Dynamics Corporation, Electric Boat Division, from 1955 to 1973 as a pipe lagger installing asbestos insulation in vessels being built by General Dynamics. Medical reports on decedent maintained by General Dynamics reveal that pulmonary function tests and x-rays of decedent dating from 1968 indicated the existence of asbestosis and pulmonary fibrosis. On June 29, 1973 decedent was forced to leave his employment with General Dynamics due to his pulmonary condition. He was hospitalized for a week and released with a diagnosis of carcinoma of the lung. Despite the previous medical examinations reflected in General Dynamics' files claimant was not informed until this hospitalization in July, 1973 of the nature of his illness and its causal relationship to his asbestos exposure at work.

Decedent returned to work for approximately six days during late July and early August, 1973. As a result of continued deterioration of his condition, however, he was again hospitalized on October 7, 1973. His death three days later was attributed to carcinoma of the lung with metastasis. Medical evidence of record indicated that decedent had also contracted asbestosis and that a specific causal relationship existed between decedent's exposure to asbestos and his fatal lung cancer.

A claim was filed on behalf of decedent's estate for compensation for permanent total disability from June 29, 1973 to October 10, 1973^{1/} and for death benefits for decedent's widow. A formal hearing was held on January 15, 1976, pursuant to § 19 of the Act, as amended, 33 U.S.C. § 919 (Supp. V, 1975). Although other issues were litigated which are not germane to the instant appeal, General Dynamics contended that, if compensation and death benefits were awarded, the Insurance Company of North America (INA) rather than General Dynamics should be held liable for payment of such award. INA was General Dynamics' worker's compensation insurance carrier until April 1, 1973. On that date General Dynamics became a self-insurer under the Act. General Dynamics took the position that, even though it was

^{1/} The days decedent worked in July and August, 1973 were excluded from this claim.

self-insured during the last three months of decedent's employment prior to his discovery of the industrial cause of his disease in July, 1973, decedent's disability and death were attributable to a disease which, the wisdom of hindsight now reveals, had developed prior to April 1, 1973, while INA was still the insurance carrier. Thus, argued General Dynamics INA was the insurer when decedent's pulmonary disease first became manifest and should therefore be liable for the claim.

In his decision and order, filed June 18, 1976, the administrative law judge awarded compensation for permanent total disability from June 29, 1973 and death benefits. Relying on this Court's decision in Travelers Insurance Co. v. Cardillo, 225 F.2d 137, cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955). The administrative law judge further found that General Dynamics was solely liable, as both employer and insurer, for all benefits awarded.

General Dynamics sought review of that decision and order by the Benefits Review Board, pursuant to § 21(b) of the Act, as amended, 33 U.S.C. § 921(b) (Supp. V, 1975). In a decision issued February 16, 1977, the Benefits Review Board also relying on Travelers, supra, affirmed the finding that General Dynamics, as a self-insured employer, is fully liable for the benefits awarded.^{2/} General Dynamics thereupon commenced this review

^{2/} Other issues raised on appeal before the Board have not been raised herein and are not relevant to this appeal.

proceeding pursuant to § 21(c) of the Act, as amended, 33 U.S.C. § 921(c) (Supp. V, 1975).

ARGUMENT

THE DECISION OF THE BENEFITS REVIEW BOARD, AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S HOLDING THAT GENERAL DYNAMICS IS LIABLE AS A SELF-INSURED EMPLOYER FOR PAYMENT OF ALL BENEFITS AWARDED HEREIN IS IN ACCORDANCE WITH LAW.

- A. The instant case is directly controlled by this Court's holding in Travelers Insurance Co. v. Cardillo.

The Director submits that under the test set forth by this Court in Travelers Insurance Co. v. Cardillo, 225 F.2d 137, cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955), General Dynamics, as the "last carrier" (i.e., self-insured) of the last (indeed, only) employer with which decedent was exposed to the injurious asbestos dust, was properly held liable for the payment of compensation.

In Travelers, this Court analyzed problems virtually identical to the issue herein. There the occupational disease was hearing loss. The Court held that the last employer with which a claimant suffers injurious exposure to a deleterious stimulus is liable for all of the cumulative effects of such exposure, even when much or even virtually all of the exposure occurred with other employers, and when the exposure with the last employer would not, in all probability, itself have been sufficient to cause the resulting disability. 225 F.2d 145.

This conclusion was based upon two considerations. First, the Court noted the virtual impossibility of apportioning the liability for disability resulting from an occupational disease of long-term etiology. 225 F.2d 144. Secondly, the Court noted that the legislative history indicated that a proposal for ratable apportionment between or among all employers, who had to varying degrees and for various lengths of time exposed a claimant to an injurious stimulus, had been suggested to Congress in hearings held pursuant to the enactment of the Act, but had not been adopted. 225 F.2d 145. Thus, the Court inferred that Congress had rejected the method of apportionment between employers and, instead, intended that the last employer bear the entire liability for compensation. Realizing that it would be

sheer folly to seek or expect to discover
a formula devoid of any possibility of
inequity or seeming injustice

this Court accepted this as a rational method of solving a complex problem which would avoid the delays and difficulties in what it considered to be the virtually impossible task of apportioning liability in occupational disease cases. 225 F.2d 144-145.

The Court then addressed the question of whether, once the liability of the last employer had been determined, successive insurers of that employer during the period of a claimant's last exposed employment should have liability for the claim apportioned between or among them. Adopting its reasoning for formulating the

"last employer" rule, the Court likewise concluded that the "last carrier" on the risk would also be liable for the entire amount of compensation.

Specifically, this Court held that

the carrier who last insured the 'liable' employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer.

225 F.2d 145.

It is evident that, on its face, this Court's holding in Travelers controls the outcome in the instant case. Decedent's last exposure to asbestos dust prior to his discovery that he was suffering from an occupationally related disease, occurred between April and June, 1973, during the period when General Dynamics was (as it continues to be) a self-insurer.^{3/} The circumstances surrounding the award to claimant Johansen in the Travelers case are virtually identical to those in the instant case. See 225 F.2d 149-141. There, Johansen had suffered his last exposed employment with Ira S. Bushey & Sons from 1942 to 1955. During that period Bushey had been insured for worker's compensation liability by;

^{3/} At p. 15 of its brief, General Dynamics argues that INA, in order to avoid liability, must prove a causal connection between any exposure which may have occurred after April 1, 1973, and decedent's disability and death. Such an assertion is directly contrary to Travelers, which mandates that General Dynamics, as a self-insurer during that last period of exposure, is liable "even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment.'" 225 F.2d 145 (footnote omitted).

American (June 8, 1927 - May 21, 1953); Hartford (June 1, 1953 - September 8, 1953); and State (September 9, 1953 - September 16, 1953 and continuing). Johansen had first noticed a hearing impairment in January and February, 1953; this persisted without diminution for several months, and Johansen consulted an ear specialist who informed him on September 16, 1953, that the impairment was work related. Johansen filed a claim for worker's compensation on October 5, 1953. He was awarded compensation and the liability for payment was placed jointly, equally and severably on American, Hartford and State, Bushey's (the "last employer") insurer during the period of Johansen's employment. This apportionment was overturned by the Court's disposition of the case, as heretofore discussed, and State was named the liable insurer even though it had been on the risk for only one week. The point is, however, that even though Johansen's disease (i.e. hearing loss) had manifested itself first during American's tenure as Bushey's insurer, and had, indeed, lasted during the period of coverage provided by all three insurers, only State, the last carrier, was held liable for the payment of compensation. Under General Dynamic's theory, American would have been liable for the loss had first manifested itself while American was on the risk. Extending that theory to the instant case, General Dynamics argues that INA should be held liable for the award herein since decedent's cancer first manifested itself (it is alleged by hindsight) during INA's tenure as General Dynamic's

carrier. Such was not the result in the Johansen award as modified by Travelers, however, and since the cases are indistinguishable on this point, such was not - and should not be - the result herein.

- B. General Dynamics has presented no arguments sufficient to cause this Court to overrule or make an exception to its holding in Travelers.

As previously demonstrated, this Court's decision in Travelers mandates an affirmance of the Benefits Review Board's decision in the instant case. Indeed, General Dynamics does not dispute the validity of Travelers case, but, without drawing any significant distinctions between that case and the instant case, asks this Court to carve out an exception to the holding in Travelers. Having shown no material distinctions between the situations addressed in Travelers and the instant case, however, General Dynamics is, in fact, requesting that this Court overrule Travelers and formulate a new rule which would allow the apportionment - to the extent of a one hundred per cent liability against INA in this case - between or among the successive insurers of a last employer.

The Director submits that the rationale underlying this Court's adoption of the "last employer - last carrier" rule is still valid. First, the "exceedingly difficult, if not practically impossible" (225 F.2d 144) task of making determinations regarding the onset of, and the degree of disability attributable at any given time to, most occupational diseases,

is as real today as it was twenty-two years ago. Indeed, medical science is just beginning to disclose many previously undetected and even unsuspected occupational diseases of uncertain etiology. See Solomons, Workers' Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems, 41 Alb. L.R. 195, 202-203, 221 (1977).

Even if it were possible to make reasonably certain determinations in the case of some occupational diseases, so that apportionment or shifting of liability could be achieved with some degree of precision, policy considerations militate against allowing such apportionment or shifting of liability in those cases. Not only would such a rule foster litigation of the apportionment question in virtually every case involving successive employers and/or carriers, with the attendant difficulties and delays recognized in Travelers, 225 F.2d 145; but such a rule would also be in derogation of the intended self-executing feature of the Act (see § 14(a), 33 U.S.C. 914(a)) which depends greatly on predictability of result to minimize the necessity of litigation to determine the liabilities and rights of the respective parties.^{4/}

Secondly, General Dynamics has made absolutely no attack on Travelers discussion of the legislative history of the

^{4/} Indeed, this policy to avoid such vexing litigation is so strong that the last employer-carrier rule is well established as a matter of general workers' compensation law. See generally 4 A. Larson, The Law of Workmen's Compensation, §§ 95.11, 95.12, 95.21 (1976).

original Act, which provided the second basis of the "last employer - last carrier" rule. An industry representative sought to amend the original language of the bill's definition of "injury" as including "disease arising out of employment"^{5/} by providing:

But only such proportion [of the disability caused by a disease] shall be compensated by the employer in whose employment disability begins as the period employed by such employer bears to the total period of the accumulation of such disease.

Hearing before the House Committee on the Judiciary, 69th Cong., 1st Sess., on H.R. 9498, April 8, 15 and 22, 1926, Serial 16 72.

As the witness clearly explained,

Leaving it as it is now, if a disability occurs during his employment, that is enough to put upon the employer at the time the disability occurred the entire expense, * * *

so long as the employment involved exposure, however briefly or slightly, to the conditions which caused the disease. Id. at 74.

He further indicated that, for the sake of simplicity, the exposure during only the one year preceding the onset of disability need be considered. Id. at 75. See also id. at 115;

Hearing before the House Committee on the Judiciary, 69th Cong., 1st Sess. on S.3170, June 29, 1926, Serial 16, Part 2 155-56,

^{5/} H.R. 9498, 69th Cong., 1st Sess. § 2(b)(2), reprinted in Hearing before the House Comm. on the Judiciary, 69th Cong., 1st Sess., on H.R. 9498, April 8, 15 and 22, 1926, Serial 16 1-2.

195-96, 198, 207. The definition, nevertheless, was passed substantially as originally drafted, without any change in its comprehensive inclusion of occupational diseases and without any provision for apportionment of liability.

As discussed hereinbefore, this Court in Travelers relied upon that legislative history to infer that

Congress intended that the employer during the last employment * * * should be liable for the full amount of the award.

* * * * *

* * * [T]reatment of carrier liability was intended to be handled in the same manner as employer liability * * *.

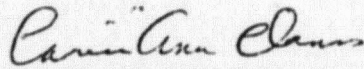
225 F.2d 145 (emphasis supplied).

We submit that Congress has taken no action which would indicate an intent to withdraw from or change the rule as recognized in Travelers. To the contrary, under the black lung benefits provisions of the Federal Coal Mine Health and Safety Act, 83 Stat. 742, as amended, 30 U.S.C. 901 et seq. (Supp. V, 1975), pursuant to regulatory authority granted the Secretary of Labor, it is the "last employer" who is liable for the payment of compensation. See 20 CFR 725.311^{6/} The regulation has been upheld as "consonant with due process" in National Independent Coal Operators Association v. Brennan, 316 F. Supp. 16 (D.D.C.) summarily aff'd, 419 U.S. 955 (1974).

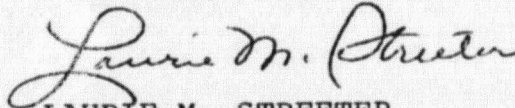
^{6/} Under the Secretary's regulation the "last employer" rule is modified only by a requirement of one cumulative year of coal mine employment with the "last employer" within fifteen years of the date of a claimant's last day of coal mine employment.

CONCLUSION

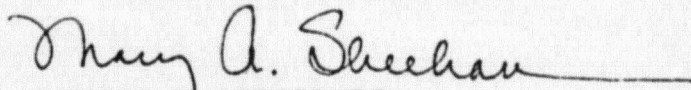
The Director submits that on its face this Court's decision in Travelers directly controls the outcome in this case. Furthermore, the rationale utilized by this Court in Travelers is still valid; General Dynamics has in no way undermined that decision or distinguished the instant case from it. Rather, the Travelers decision still provides a rational and just rule of easy predictability which is necessary for the efficient operation of the Act. The decision of the Benefits Review Board, adopting the rule in Travelers and relying upon it, should be affirmed.



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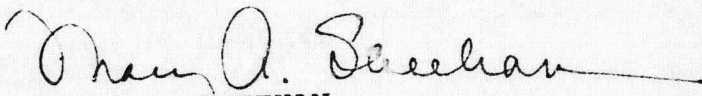
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Director, Office of Workers' Compensation Programs was served on Matthew Shafner, Esq., O'Brien, Shafner, Garvey, Bartinite & Stuart, 600 Bridge Street Extension, Groton, Connecticut 96340, attorneys for Helen Sobolewski; Norman Beane Esq., Murphy & Beane, 106 State Street, Boston, Massachusetts 92109, of counsel, and Alexander Vitale, Esq., Kirlin, Campbell & Keating, 120 Broadway, New York, New York 10005, attorneys for General Dynamics, Electric Boat Division; and Frank W. Daley, Esq., 109 Church Street, New Haven, Connecticut 96510, attorney for Insurance Company of North America, by mailing copies thereof to said attorneys, postage prepaid, on August 12, 1977.


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